Supreme Court, U.S.
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No. 05-781

In The

Supreme Court of the United States

RONALD D. PLANESI,

Petitioner,

vs.

U.S. COPYRIGHT OFFICE ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION FOR REVIEW

Does 37 C.F.R. 202.1(a), with the aid of the lower courts' "statutory construction," contravene the intent of the authors of the U.S. Constitution, in particular Article I, Section 8, Paragraph 8, and the intent of the several ratifying states, which granted the power to Congress to protect the writings of authors and inventors, and through the protection of those works, promote commerce as well as "Science and the useful Arts"?

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CORPORATE DISCLOSURE

Not Applicable.

TABLE OF CONTENTS

	Page
Citation of Orders	1
Basis for Jurisdiction	1
Constitutional Provision	1
Regulation	2
Statement of the Case	2
Argument	7
Conclusion	18

TABLE OF AUTHORITIES

Page

CASES:

Advanz v. Miraflor, United States District Court for The Central District of California, Western Division, 21 F. Supp. 2d 1179 (1998) 13

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) 10

Burrow-Giles Lithographic Company v. Sarony, Supreme Court of the United States, 111 U.S. 53, 4 S. Ct. 279 (1884) 9

Fidelity etc. Co. v. Federal etc. Co., 217 Cal. 307 (1933) 12

G. & C. Merriam Co. v. Ogilvie, No. 730, Circuit Court of Appeals, First Circuit, 159 F. 638 (1908) 15

Goldstein et al. v. California, No. 71-1192, Supreme Court of the United States, 412 U.S. 546, 93 S. Ct. 2303 (1973) 9

Henderson v. Tomkins, 60 Fed. Rep. 758 (1894) 10

Jaynes v. Weickman, 55 Cal.App. 557 (1921) 12

Johnston v. Century-Fox Film Corp., 82 Cal.App.2d 796 (1947) 12

Mazer et al. v. Stein et al.. No. 228, Supreme Court of the United States, 347 U.S. 201 (1954) 6

Merriam et al. v. Famous Shoe & Clothing Co., Circuit Court, Missouri, E.D., 47 F. 411 (1891) 11

Tin Pan Apple v. Miller Brewing, No. 88 Civ. 4085 (CSH), 1994 U.S. Dist. LEXIS 2178 (S.D.N.Y. Feb. 23, 1994) 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

U.S. Constitution, Article I, Section 8, Paragraph 8.....*passim*

U.S. Constitution, Article III, Section 1..... 1

U.S. Constitution, Article III, Section 2, Clause 1..... 1

Title 17, United States Code, Section 101 2

Title 17, United States Code, Section 102 2

37 Code of Federal Regulations, 202.1 .....*passim*

Copyright Act of 1909..... 3

OTHER AUTHORITIES:

House Report on Copyright Act of 1976, No. 94-1476, 94th Cong., 2d Sess. 154 (1976)..... 13

Jury Charge 3, Devitt, Blackmar & Wolf, Federal Jury Practice and Instructions (4th ed. 1987)..... 13

Nimmer on Copyright (Rel. 31-7/92 Pub. 465) 8

CITATION OF ORDERS

United States District Court for the Eastern District of California, No. CIV S-03-2062 MCE DAD-PS, filed September 15, 2004.

United States Court of Appeals for the Ninth Circuit, No. 04-16936, filed August 15, 2005.

BASIS FOR JURISDICTION

Appeal is sought from the United States Court of Appeals from the Ninth Circuit and, as well, the United States District Court for the Eastern District of California. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2).

Copyright mandates and statutes are federal, and acceptance of an application for, and the granting of, Copyright is a federal function.

U.S. Constitution, Article III, Section 1, "The judicial Power of the United States shall be vested in one supreme court. . . . "

U.S. Constitution, Article III, Section 2, Clause 1, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution. . . . "

Rule 29.4(b) of (c), Notifications have been made.

CONSTITUTIONAL PROVISION

The U.S. Constitution is a federal founding document, and states that Congress is granted the power, in Article I,

Section 8, Paragraph 8, "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors, the exclusive right to their respective Writings and Discoveries."

REGULATION

Title 17 United States Code, Section 101. Definitions, "'Literary works' are works, other than audiovisual works, expressed in *words*, numbers, or other *verbal* or numerical *symbols* or *indicia*, regardless of the nature of the material objects. . . . "

Title 17 United States Code, Section 102. Subject matter of copyright: In general: "(a) Copyright protection subsists, in accordance with this title, in *original works* of authorship fixed in any *tangible* medium of expression, now or later developed, from which they can be perceived, reproduced, or otherwise communicated. . . . "

37 C.F.R. 202.1(a) is a federal regulation, stating, "The following are examples of *works* not subject to copyright and applications for registration of such works cannot be entertained: (a) *Words* and short phrases such as *names, titles*. . . . "

STATEMENT OF THE CASE

The U.S. Copyright Office published, attendant to 37 C.F.R. 202.1, informational Circulars 32 and 34, wherein it is stated that a "title" is not copyrightable, without noting that indicia, if original, are specifically listed as protectable under Title 17 Copyright statutes, and without noting

that indicia may also be used as a "title," and also disregarding the fact that the U.S. Constitution, Article I, Section 8, Paragraph 8, states, "writings," and the U.S. Copyright Act of 1909 states, "all writings," both evident without stricture as to brevity.

In 1984, 37 C.F.R. 202.1 was not (and still is not) listed or cited in Title 17 statutes or in Copyright Application Forms or Instructions.

In the period from January 26, 1984 to May 14, 1984, the single original word, KINGMASTER, was created to convey and carry a complete thought and specific meaning and environment of complex meaning to domestic and international (non-English speaking) markets, and Copyright registration TXU 160-239 was obtained for said original word as the specifically expressed title for a innovative, hexagon-based "two to six player chess game," as an indicia for winning said two to six player game in a most difficult and specifically delineated method of play (one against all), an appellation and indicia for winning said game in said specific method of play, an organizational and business entity name for national and international market entry, and, as well, for the actual description, delineation and rules for said specific game. Being poor of any resource save time and creative energy, Ronald D. Planesi did carefully examine Title 17 of the United States Code prior to submission for Copyright, particularly for a certainty of intellectual property protection per the U.S. Constitution, Article I, Section 8, Paragraph 8, for all listed elements, and also examined Trademark regulation for marketing and dissemination considerations. Trademark, however, in 1984, was statutorily unavailable due to a lack of on-going interstate commerce.

In 1984 Ronald D. Planesi did begin to use the original word and title, "Kingmaster," as a title and indicia and did begin distribution of approximately 2000 2"x4" pictures of said game with Copyright marks imprinted as required by Chapter 17 statutes.

In 1995 Ronald D. Planesi did initiate the use of the original word and title, "Kingmaster," with appropriate Copyright mark, as a title and indicia for said "two to six player chess game," on the Internet, thus effecting completely open international dissemination.

After Ronald D. Planesi's worldwide dissemination of the original title and indicia, "Kingmaster," with appropriate Copyright marks, the U.S. Patent and Trademark Office did issue and reissue a trademark to Penn Fishing Tackle Manufacturing Company without even consulting easily available U.S. Office of Copyright internet databases to determine possible Copyright infringement, probably as a direct result of the wording of 37 C.F.R. 202.1. Penn Fishing Tackle Manufacturing Company claims to have not used the title or indicia on any product, yet continuously maintained open trademark applications without filing any active use statements and yet maintained a statement toward trademark rights for a period of approximately eight years (terminating such within this action).

Also, after Ronald D. Planesi's worldwide dissemination of the original title and indicia, "Kingmaster," Southern Kingfish Association LLC did use the specifically expressed indicia and title, "Kingmaster" as an indicia and title for several fishing tournaments conducted on the east and gulf coasts of the United States, and Kingmaster LLC did use the specifically expressed indicia and title for a

company name and as the title for a series of cable television programs viewed primarily on Liberty (eastern and gulf coast cable) channels from approximately 1998 to 2004.

In addition, after Ronald D. Planesi's worldwide dissemination of the original title and indicia, "Kingmaster," Excalibur Electronics, Inc. did use the specifically expressed indicia and title for gainful profit by placing said indicia and title on several of Excalibur Electronics, Inc.'s common "square-based" two-player computer chess variant games, similar as to other Internet-available and store-available games, thereby using the expressed indicia and title to differentiate itself from its competitors starting approximately in the year 2000 and continuing to do so until this present day.

Case CIV.S-03-2062 MCE DAD-PS was filed in the United States District Court for the Eastern District of California on September 30, 2003. The issue of 37 C.F.R. 202.1(a)'s variance against the U.S. Constitution, Article I, Section 8, Paragraph 8, was raised in initial brief (Page 11, lines 11 through 16). Penn Fishing Tackle Manufacturing Company was the sole respondent represented at the single concurrent Status and Motion to Dismiss Conference (despite service of all parties, including Federal agencies and Attorneys General, by USPS receipted and noticed overnight Express method of registered mail) which was conducted on January 9, 2004. The case was dismissed without further hearing on September 15, 2004 for "failure to state a claim."

Appeal 04-16936 was timely submitted to the United States Court of Appeals for the Ninth Circuit on October 28, 2004. The issue of 37 C.F.R. 202.1(a)'s variance against

the U.S. Constitution, Article I, Section 8, Paragraph 8, was raised in the initial brief. The appeal was dismissed without hearing as "unpersuasive" and "lacking merit" on August 15, 2005.

A Writ of Certiorari is requested because an important question of federal law (the prior application of Copyright to titles by Appeals Courts prior to 37 C.F.R. 202.1, and the application of Copyright to original single words within inferior courts since 37 C.F.R. 202.1) has not been, but should be, settled by this Court.

The application of the U.S. Constitution's grant of power by the several states to the United States Congress to promote "Science and the useful Arts" by protecting the works of all authors and inventors based on the original intellectual manufacture, reduction to tangibility, and dissemination of writings and inventions, specifically in relation to 37 C.F.R. 202.1, is therefore in serious question and is specifically mentioned in:

> Mazer et al., v. Stein et al., No. 228, Supreme Court of the United States, 347 U.S. 201; 219, 1954; Justice Douglas (Opinion), Justice Black (concur), "*An important constitutional question* underlies this case – a question which was stirred on oral argument but not treated in the briefs. It is *whether these* statuettes of dancing figures *may be copyrighted* . . . [Objection to Magistrate Judge's Findings and Recommendations, Page 9 Line 23 -39, Excerpts of Record, Page 68]

ARGUMENT

A resource-poor inventor or author always has one major resource at his or her disposal, regardless of circumstance: creative originality (the touchstone of Copyright). Resource-poor inventors and authors frequently can depend only on their creativity and originality to break into the common local, national and even international market. Creativity and originality certainly is an extremely common "agreed on" basis for establishing strong product identity or entity identity within the local, national and international marketplaces.

The value of an original title or indicia, as established by "naming consultants," is frequently in excess of $75,000, and even common titles used as Uniform Resource Locators (URLs) on the Internet have been sold for more than $7,000,000 (e.g., business.com). Such value must be supported and protected by any court of equity.

No opposition citation presented in the lower courts has been focused on, or even contains, an original word, original word product title, or original word entity title. All cited opposition cases contain unoriginal material as titles, words, or even "consonant only" word fragments (as functional security codes) to support the contention that even wholly complete original titles and wholly complete original single words with substantial perceptible meaning will not be entertained for Copyright per 37 C.F.R. 202.1(a).

On this issue, it is also instructive to note that even 37 C.F.R. 202.1 describes individual words and titles as "works" without making special inclusion or exception for "original" works – the very touchstone of Copyright.

The U.S. Constitution is a federal founding document of known authors and reasonably known intent and is ratified by known States. 37 C.F.R. 202.1(a), however, is a federal regulation of unknown authors and unknown intent which operates in direct contravention to the obvious intent of the United States Constitution, Article I, Section 8, Paragraph 8.

The U.S. Constitution does not grant Congress the right to deny Copyright on the very intended original "works" upon which the U.S. Constitution and the several states intended to grant Copyright, and the U.S. Constitution specifically does not grant Congress the right to inhibit "Science and the useful Arts."

A consideration of the intent of the authors of 37 C.F.R. 202.1(a) has confused and mystified even Nimmer. It is illuminating to note that Nimmer on Copyright (Rel. 31-7/92 Pub. 465) at Section 2.16, 2-185, states:

> "Often the primary commercial value in a copyrighted work will lie in its title. For instance, a great deal of money may be expended in purchasing motion picture rights in a copyrighted work which is itself based upon public domain materials where substantially the *only value* acquired *is the use of* a well known and publicly accepted *title*, since the remainder of the motion picture will borrow from the public domain materials, but not from the copyrighted work. It is rather surprising, then, that for the most part, copyright may not be claimed in a title.
>
> "As a matter of first impression, it might well be argued that fanciful original titles should be regarded as a form of literary expression, protectible under the copyright laws. Moreover, nothing

> in the Copyright Clause of the Constitution, nor in the Copyright Act itself, expressly precludes such protection."

Ergo, Nimmer notes that in Copyright protected works, it is curious that often the most valuable element of a work is made, ostensibly, by 37 C.F.R. Section 202.1(a) with the attendant "statutory construction by the courts," immediately and completely valueless to all except those of greater resource.

The U.S. Congress and even colonial legislation [Request for Judgment in Default, Page 35 Line 32 to Page 36 Line 37, Excerpts of Record, Pages 46-47] [Complaint, Page 21, Line 8-Line 16 and Line 21-Line 28, Excerpts of Record, Page 4], as well as prior law, has, at multiple times, named or referred to Copyright as a "right," and said right is specifically delineated in the U.S. Constitution in a particular manner, specifically "copyright," which Congress, separate from the court's read of 37 C.F.R. Section 202.1(a), has never failed to support. The Supreme Court of the United States also has never failed to support originality as the basis for Copyright (underlined emphasis added):

> Burrow-Giles Lithographic Company vs. Sarony, Supreme Court of the United States. 111 U.S. 53, 4 S. Ct. 279; 28 L. Ed. 349 U.S. Lexis 1757, 1884: "writings and physical rendering," "An author in that sense is *'he to whom anything owes its origin'*; *originator*; maker; one who completes a work of science or literature." [Complaint, Page 20 Line 1-Line 13, Excerpts of Record, Page 3]
>
> Goldstein et al vs. California, No. 71-1192, Supreme Court of the United States, 412 U.S. 546; 93 S. Ct. 2303; 37 L. Ed. 2d 163; 1973 U.S.

> LEXIS 15; 178 U.S.P.Q. (BNA) 129, December 13, 1972, Argued, June 18, 1973, Decided: "By Art. I, § 8, cl. 8, of the Constitution, the States granted to Congress the power to protect the 'Writings' of 'Authors.' These terms have not been construed in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of *constitutional principles*. While an 'author' may be viewed as an individual who writes an original composition, the term, in its constitutional sense, has been construed to mean an '*originator*,' 'he to whom anything owes its *origin*.' [Complaint, Page 15, Line 13-22, Excerpts of Record, Page 2]
>
> Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250. The least pretentious picture has more *originality* in them than directories and the like, which may be copyrighted. Drone, Copyright, 153. See Henderson v. Tomkins, 60 Fed. Rep. 758, 765 "Under the copyright side of the statute, however, especially so far as it relates to dramatic compositions, *what appeals to the sense of curiosity, or excites wonder, is especially valuable, and therefore must be protected, or the purpose of the statute would fail in a very large measure* . . . And in view of the fact that the demurrer necessarily admits, for all present purposes, that the defendant has taken the trouble *to imitate* the complainant's production, another observation of Mr. Drone is also pertinent: '*If it has merit and value enough to be the object of piracy, it should also be of sufficient importance to be entitled to protection* . . . '"). [Request for Judgment in Default, Page 32 Line 2-Line 22, Excerpts of Record, Page 44]

In addition, at the Circuit Court level, wording in cases prior to 37 C.F.R. 202.1, uphold the existence of

Copyright in a name and title (underlined emphasis added):

> Merriam et al. v. Famous Shoe & Clothing Co., Circuit Court, E.D. Missouri, E.D., 47 F. 411;413 1891 "Opinion: [*413] Tharyer, J. "I have no doubt that defendant is entitled to use the words "*Webster's Dictionary*" to describe the work that it is engaged in publishing and selling. *Those words* were used to describe Webster's Dictionary of the edition of 1847, and, *as the copyright on that edition has expired*, it has now become public property . . . *The latter words, which appeared on the title-page and on the outer cover* of books of the edition of 1847, have *become public property, as well as other parts of the work.*" [Request for Judgment in Default, Page 14, Line 14-Line 24, Excerpts of Record, Page 35]

That the "words" "become" public property on the expiration of the copyright means they must not have been public property before the expiration of the copyright – ergo they must have been protected by the copyright and therefore was the private intellectual property of Merriam.

At least one United States Federal Circuit Court has also upheld Copyright in a single word (underlined emphasis added):

> Tin Pan Apple v. Miller Brewing, No. 88 Civ. 4085 (CSH), 1994 U.S. Dist. LEXIS 2178, S.D.N.Y. Feb. 23, 1994. "I hold that a jury could find that the Hugga-Hugga and Brrr sounds, used as lyrics in the copyrighted work, are *sufficiently creative to warrant copyright protection.*" [Request for Judgment in Default, Page 39, Line 12-Line 14 to Page 42, Line 9-Line 11, Excerpts of Record, Page 48-51] [Objections to Magistrate

Judge's Findings and Recommendations, Page 8, Line 10-Line 33, Excerpts of Record, Page 67]

At least one state court has upheld Copyright in title (underlined emphasis added):

> Johnston v. Century-Fox Film Corp., 82 Cal.App.2d 796 at P. 808 "The *author of any product of the mind has an exclusive ownership* therein and in the representation or expression [*808] thereof which continues so long as the product and the representations or expressions thereof made by him remain in his possession. (Civ. Code, § 980.) There may be ownership of such products of labor or skill as the composition of an author and of rights created by statute. (Civ. Code, § 655.) The *ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others*. The thing of which there may be ownership is called property. (Civ. Code, § 654.) . . . HN2 *A product of the mind is property*.
>
> "There can be *no property* in words which are merely *generic or descriptive*. (Fidelity etc. Co. v. Federal etc. Co., 217 Cal. 307 [18 P.2d 950]; Jaynes v. Weickman, 55 Cal.App. 557, 558 [203 P. 828].) *However*, [***19] *a person may have a property right and the right to the exclusive use of arbitrary or fictitious or fanciful or artificial or technical names or titles. They have a special significance. They are creations of the mind*..{187 P.2d 474 "Queen of the Flattops"} *'The author of any product of the mind has an exclusive ownership therein . . . '*. [Request for Judgment in Default, Page 23, Line 18-Line 25, Excerpts of Record, Page 41] [Objections to Magistrate Judge's Findings and Recommendations, Page 7,

> Line 22 to Page 8 Line 6, Excerpts of Record, Page 67]

In addition, other authorities cite originality as the first consideration in determining copyrightability (underlined emphasis added):

> Jury Charge 3 Devitt, Blackmar and Wolff, Federal Jury Practice and Instructions (4th ed. 1987) at Section 99.04, p. 808, "(advising the jury *in copyright actions that 'first disputed issue is originality'*)." [Request for Judgment in Default, Page 41, Line 27-Line 30, Excerpts of Record, Page 50]

The intent of the U.S. Constitution, Article I, Section 8, Paragraph 8, is in part examined in Advanz vs. Miraflor, United States District Court for the Central District of California, Western Division, 21 F. Supp. 2d 1179; 1998 (emphasis added):

> "HN1 The Copyright Act provides that "the Register of Copyrights shall establish regulations specifically permitting *a single registration for a group of works by the same individual author. . . .* " 17 U.S.C. § 408(c)(2). As the statute explains, however, "this administrative classification of works has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title." 17 U.S.C. § 408(c)(1). The legislative history indicates that the purpose of allowing related works to be registered together as a group *to avoid* situations in which *"the technical necessity for separate application and fees has caused copyright owners to forego copyright altogether."* The House Report on the Copyright Act of 1976, No. 94-1476, 94th Cong., 2d Sess. 154. [Objections to Magistrate Judge's Findings

and Recommendations, Page 11, Line 13 to Page 12, Line 10, Excerpts of Record, Page 70-71]

Ergo, the Court thereby recognized that the legislative history includes the concept that a situation or regulatory action or requirement which causes potential copyright owners to forego copyright, as 37 C.F.R. 202.1 does, is to be avoided in law.

In addition, 37 C.F.R. 202.1(a) also functions as a 100% tax levy on any original product title or entity title developed and disseminated by a resource-poor author or inventor. The U.S. Trademark Office's full "fee value" on an individual Trademark used by 46 different manufacturers in 46 different product categories (46 categories times $335 per category) totals $15,410. In order to maintain full intellectual property ownership by universal Trademark application of an original product title or entity title of intellectual manufacture valued on the open market at approximately $75,000 each in multiple areas of use, a resource-poor author or inventor would need to file an initial application at a cost of $335, and then file 45 supplemental applications at $25 per product or industry area plus meet the requirement of proving interstate commerce in each of the supplemental product or industry areas, for a total of $1,460 in statutory fees, and the expenditure of unknown hundreds of thousands or millions of dollars in costs in order to meet the statutory requirement of proving interstate commerce within each of the supplemental applications (assuming the U.S. Patent and Trademark Office would even allow such an application).

In no clause or section of the U.S. Constitution have the states granted Congress the right to levy such an

excessive tax on any legal product or legal resource, yet Congress, through 37 C.F.R. 202.1(a) does certainly levy such a confiscatory tax on the established and tangible works of authors of wholly original individual words and titles, and then may statutorily re-distribute, for a fee, those products and resources to resource-rich competitors, as has happened in this case. The U.S. Patent and Trademark Office thereby gains value from the marketplace worth of such works and distributes it to resource-rich entities who may even be direct competitors of the originator, as well as generates and distributes fees to the United States Government, without even minimal explanation as to why a 100% tax is necessary on this particular product and resource category. That this category of product and resource was one which the framers of the U.S. Constitution, the collective states, and especially the early U.S. courts, appeared to intend to protect seems undeniable.

> G. & C. Merriam Co. v. Ogilvie, No. 730, Circuit Court of Appeals, First Circuit, 159 F. 638; 1908 "Overview: The publisher marketed dictionaries and it *had a copyright on the name* 'Webster'." [Request for Judgment in Default, Page 15, Line 22-Line 33, Excerpts of Record, Page 36]

The creation of single words and names such as titles for products, services and companies concerns and involves the science of human language and art at the higher levels of human forethought (discernment of a current value and a reasonably accurate prediction of future values). Therefore the creation of words and names for products, services, and companies must be either a "science" or an "art" or both. No product and no company may succeed in the open market without proper identification and differentiation from its competitors – an entire

United States government agency, the U.S. Trademark Office, owes its very existence to this basic concept of even common commerce. And future products, services and companies of the United States of America, within the international marketplace, will be recognized and remembered according to the tenets of the international strictures of this science or art of naming products, services and companies, and success will depend on America's abilities to understand and implement those tenets. The fact that the good name of a product, service or company is critical to its successful economic implementation in the marketplace, and particularly in the international marketplace, is very well understood to form the very basis of modern advertising and marketing foundations.

As the U.S. Constitution, and the several states which ratified the U.S. Constitution, specifically granted to Congress the charge of promoting "Science and the useful Arts," the "Science" or "useful Art" of naming products, services or companies must also be promoted, and certainly cannot not be inhibited by any legislation, or such legislation would specifically contravene the intent of the U.S. Constitution, particularly in regard to commerce, but also in regard to Article I, Section 8, Paragraph 8, as well as contravene the intent of the several states that ratified the Constitution. If it is Congress' specific intent to inhibit a specific science or useful art in contravention to Article I, Section 8, Paragraph 8, then it is incumbent on Congress to explain the reason behind this contravening intent, and it is even possible to beg the question as to whether such obvious contravention could be sufficiently explained, but rather would require Constitutional Amendment.

Finally, it is very well known in human nature that a confiscatory policy does not promote any human endeavor

and, in fact, inhibits it. In point of fact, criminal behavior has been considered to be inhibited by appropriate confiscatory government action since the inception of the first forms of government, and the application of 37 C.F.R. 202.1(a) to even original words with substantial perceptible meaning, names, titles and even indicia forces the question, "Does the United States Congress consider the origination of single words with substantial perceptible meaning, names, titles and indicia criminal behavior?" If so, then the origination of "small works" would be easily considered a small crime and the origination of larger works would be reasonably considered a "larger," or perhaps "felonious" crime, and such a concept is clearly contrary to the intent of the U.S. Constitution, Article I, Section 8, Paragraph 8, for that paragraph seems to indicate that such behavior is desirable in United States citizens and has been "rewarded" to some extent by a grant of "monopoly" (as first established by the early United States Congress and the several states' early legislatures, which continues to this day in statute) when proven in evidence.

37 C.F.R. 202.1(a), therefore, if applied in such a wholly confiscatory manner even to original words of substantially discernible meaning, names or titles and indicia, appears to be specifically designed to, and does surely inhibit, rather than promote, the specific "Science" and "useful Art" of naming products, services and companies, and therefore is in direct contravention of the U.S. Constitution, Article I, Section 8, Paragraph 8's specifically stated purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD D. PLANESI, Pro Se

2005 WL 1939885 (9th Cir. (Cal.))

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONALD D. PLANESI, Plaintiff-Appellant, v. MAYBETH* PETERS; et al., Defendants-Appellees.	No. 04-16936 D.C. No. CV-03-02062-MCE MEMORANDUM**

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, District Judge, Presiding

Submitted August 1, 2005***

(Filed Aug. 15, 2005)

Before: O'SCANNLAIN, CALLAHAN, and BEA, Circuit Judges.

Ronald D. Planesi appeals pro se the district court's dismissal of his copyright action for failure to state a claim. We have jurisdiction under 28 U.S.C. § 1291. After de novo review, *see Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004), we affirm.

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* [Should be spelled Marybeth.]

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

*** The panel unanimously finds this case suitable for decision without oral argumen See Fed. R. App. P. 34(a)(2).

The district court properly dismissed Planesi's copyright infringement claim because the one-word name of Planesi's board game is not entitled to copyright protection. *See* 37 C.F.R. § 202.1(a) (words and short phrases are not subject to copyright). We are not persuaded by Planesi's constitutional challenges to the regulation and information circulars.

To the extent Planesi attempts to raise a claim under 15 U.S.C. § 1125 for the first time on appeal, we do not consider the issue. *See Brazil v. U.S. Dep't of Navy*, 66 F.3d 193, 199 (9th Cir. 1995).

Planesi's remaining contentions lack merit.

The clerk shall file the substitute reply brief received on January 3, 2005.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD PLANESI, Plaintiff-Appellant, v. MAYBETH* PETERS; et al., Defendants-Appellees.	No. 04-16936 D.C. No. CV-03-02062-MCE **JUDGMENT**

Appeal from the United States District Court for the Eastern District of California (Sacramento).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 08/15/05

* [Should be spelled M[illegible]ybeth.]

App. 4

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RONALD D. PLANESI,

Plaintiff,

vs.

MARYBETH PETERS,
Register of Copyrights, et al.,

Defendants.

/

No. CIV S-03-2062
MCE DAD PS

ORDER

(Filed Sep. 15, 2004)

Plaintiff, proceeding pro se, filed the above-entitled action. The matter was referred to a United States Magistrate Judge pursuant to Local Rule 72-302(c)(21).

On August 6, 2004, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Plaintiff has filed objections to the findings and recommendations and defendants have filed a reply.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed August 6, 2004, are adopted in full;

2. Defendants Martin and Penn Fishing's motion to dismiss for failure to state a claim is granted and this entire action is dismissed with prejudice as to all named defendants; and

3. The federal defendants' motion to dismiss is denied as moot.

DATED: 9-15-04 .

/s/ Morrison C. England, Jr.
UNITED STATES DISTRICT JUDGE
MORRISON C. ENGLAND, JR.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RONALD D. PLANESI

v.

MARYBETH PETERS

JUDGMENT IN A CIVIL CASE

(Filed September 16, 2004)

CASE NUMBER:
CIV S-03-2062 MCE DAD PS

XX – **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF SEPTEMBER 15, 2004.

Jack L. Wagner,
Clerk of the Court

ENTERED: September 16, 2004

by: H. Kaminski
H. KAMINSKI, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RONALD D. PLANESI,
Plaintiff,
v.
MARYBETH PETERS,
Register of Copyrights, et al.,
Defendants.
/

No. CIV. S-03-2062
MCE DAD PS

FINDINGS AND
RECOMMENDATIONS

(Filed Aug. 6, 2004)

This matter is before the court on defendants Kevin Martin and Penn Fishing Manufacturing Company's motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(2), 12(b)(4), 12(b)(6), 12(e) and 12(f). For the reasons set forth below, the undersigned will recommend that defendants' motion to dismiss for failure to state a claim be granted and that plaintiff's complaint be dismissed as to all defendants.

LEGAL STANDARDS

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the sufficiency of the complaint. *North Star Intel v. Arizona Corp. Common,* 720 F.2d 578, 581 (9th Cir. 1983). Dismissal of the complaint, or any claim within it, "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1990). *See also Robertson v. Dean Witter Reynolds, Inc.,* 749 F.2d 530, 534 (9th Cir. 1984). On a motion to dismiss brought pursuant to Rule 12(b)(6) a complaint, or portion thereof,

should only be dismissed for failure to state a claim upon which relief can be granted if it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim or claims that would entitle plaintiff to relief. *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson,* 355 U.S. 41 (1957)); *Palmer v. Roosevelt Lake Log Owners Ass'n,* 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a complaint under this standard, the court must accept as true the allegations of the complaint. *Hosp. Bldg. Co. v. Rex Hosp. Trustees,* 425 U.S. 738, 740 (1976). Furthermore, the court must construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *See Jenkins v. McKeithen,* 395 U.S. 411, 421 (1969). In a case where the plaintiff is pro se, the court has an obligation to construe the pleadings liberally. *Bretz v. Kelman,* 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (*en banc*). However, the court's liberal interpretation of a pro se complaint may not supply essential elements of a claim that are not pled. *Ivey v. Bd. of Regents of Univ. of Alaska,* 673 F.2d 266, 268 (9th Cir. 1982); *see also Pena v. Gardner,* 976 F.2d 469, 471 (9th Cir. 1982).

ANALYSIS

Plaintiff, proceeding pro se, initiated this copyright infringement action by filing his complaint and paying the appropriate filing fee on September 30, 2003. The lengthy and somewhat difficult to decipher complaint alleges that plaintiff created the original word "Kingmaster" which is the title of a "'six player chess game' variant" created by plaintiff. The complaint alleges that the word "Kingmaster" and the rules of the game are copyrighted in plaintiff's name. A Certificate of Copyright Registration from

the United States Copyright Office for the "[full rules of play for the 6-player chess and checker game called 'Kingmaster'" is attached to the complaint. Plaintiff's complaint alleges that defendants Martin and Penn Fishing, along with other private defendants, have infringed on plaintiff's copyright by selling products bearing the word "Kingmaster."[1]

The moving defendants challenge plaintiff's complaint on a variety of grounds. However, it is not necessary to address all of defendants' arguments in light of defendants' persuasive assertion that the "words and short phrases" doctrine bars this copyright action.

In this regard, "[w]ords and short phrases such as names, titles, and slogans" are not subject to copyright. 37 C.F.R. § 202.1(a). Referring to 37 C.F.R. § 202.1(a), one circuit has stated:

> It is axiomatic that copyright law denies protection to 'fragmentary words and phrases' and to 'forms of expression dictated solely at functional considerations' on the grounds that these materials do not exhibit the minimal level of creativity necessary to warrant copyright protection. . . .

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[1] Defendants Martin and Penn Fishing represent in their motion that at one time they sold fishing reels bearing a "Kingmaster" label. On the other hand, while not totally clear in this regard, the complaint and its attachments suggest that Martin and/or Penn Fishing sponsored a "Kingmaster" or "Kingmasters" fishing tournament, as did the Liberty Channel and Southern Kingfish Association defendants. The complaint also suggests that the other private defendant, Excalibur Electronics, has developed some other type of chess game titled "Kingmaster."

> The Copyright Office's own interpretive regulations explicitly embrace this rule of non-copyrightability.

CMM Cable Rep. Inc. v. Ocean Coast Props., Inc., 97 F.3d 1504, 1519-20 (1st Cir. 1996) (citations omitted). Cases in the Ninth Circuit are in accord with this rule. *See Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524 n.7 (9th Cir. 1992) ("Finally, we note that Sega's security code is of such de minimis length that it is probably unprotected under the words and short phrases doctrine."); *Shaw v. Lindheim*, 919 F.2d 1353, 1362 (9th Cir. 1990) ("titles, in and of themselves, cannot claim statutory copyright"); *Advanz Behavioral Mgmt. Res., Inc. v. Miraflor*, 21 F. Supp. 2d 1179, 1190 (C.D. Cal. 1998) ("Words or short phrases, of course, are not themselves copyrightable subject matter.").

Here, the one-word title to the chess game variant allegedly created by plaintiff is not entitled to federal copyright protection. Based on the clear language of 37 C.F.R. § 202.1(a), and the numerous cases which have honored that clear language, the court is compelled to find that the single word "Kingmaster" is simply too short and insubstantial to be copyrighted. *Compare Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 711 (7th Cir. 1972) (denying protection to the advertising phrase most personal sort of deodorant"), *with Salinger v. Random House*, 811 F.2d 90, 98-99 (2d Cir. 1987) (finding highly original expressions in plaintiff's unpublished letters infringed by paraphrasing of multiple passages). Because plaintiff's complaint lacks a cognizable legal theory, the court will recommend that defendants' motion to dismiss be granted. *See Parham v. Pepsico, Inc.*, 927 F. Supp. 177, 179-80 (E.D. N.C. 1995) (granting Rule 12(b)(5) motion

and dismissing copyright infringement claim because ordinary phrase was not copyrightable).

In his opposition to the pending motion, and in his complaint, plaintiff challenges 37 C.F.R. § 202.1(a) as running afoul of the Copyright and Patent Clause, U.S. Const., Art. I, § 8, cl. 8, which provides as to copyrights: "Congress shall have Power . . . [t]o promote the Progress of Science . . . by securing [to Authors] for limited Times . . . the exclusive Right to their . . . Writings." However, plaintiff has advanced no meaningful argument in support of this somewhat ironic proposition.[2] Further, the rule embodied in 37 C.F.R. § 202.1(a) has been recognized as "axiomatic" and "'a fair summary of the law.'" *CMM Cable Rep, Inc.*, 97 F.3d at 1519, 1520 n.21 (quoting *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 266 F.2d 541, 544 (2d Cir. 1959)). Finally, it is appropriate for this court to refrain from deciding constitutional issues unless absolutely necessary. *Gutierrez v. INS*, 745 F.2d 548, 550 (9th Cir. 1984) ("It is well-settled that a court should refrain from deciding a constitutional issue when a nonconstitutional ground for decision is available."). Therefore, plaintiff's challenge to the words and short phrases doctrine in general, and 37 C.F.R. § 202.1(a) in particular, is unpersuasive.

The court is also unpersuaded by plaintiff's argument that the word "Kingmaster" is entitled to copyright protection because it is an "indicium" expressly entitled to protection under federal copyright law. In this regard,

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[2] Citing 37 C.F.R. § 202.1(a), one court has observed: "In the spirit of protecting expression without stifling ideas, courts have refused to extend protection to short phrases." *Johnson v. Auto. Ventures, Inc.*, 890 F. Supp. 507, 511 (W.D. Va. 1995) (citations omitted).

plaintiff relies on the definition of "literary works," which are described in the Copyright Act as "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or *indicia*. . . . " 17 U.S.C. § 101 (emphasis added). Plaintiff misreads 17 U.S.C. § 101. That statute simply provides that a literary work can be comprised of words, numbers or other symbols or indicia. It does not state that single words, numbers or other symbol or indicia amount to literary works. Indeed, as just discussed, fragmentary words and short phases are not copyrightable. Accordingly, plaintiff's attempt to characterize the word "Kingmaster" as a literary work is unavailing.

The court recognizes that not all of the defendants named by plaintiff have filed motions to dismiss, or joined in the pending motion, and still others may have never been appropriately served by plaintiff. Nonetheless, the court "may properly on its own motion dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of moving defendants or where claims against such defendants are integrally related." *Silverton v. Dep't of Treasury,* 644 F.2d 1341, 1345 (9th Cir. 1981). *See also Omar v. Sea-Land Service, Inc.,* 813 F.2d 986, 991 (9th Cir. 1987) ("Such a dismissal may be made without notice where the plaintiff cannot possible [sic] win relief."). The court's authority in this regard includes sua sponte dismissal both as to defendants who have not been served and those who have not yet answered or appeared. *See Ricotta v. State of California,* 4 F. Supp. 2d 961, 978-79 (S.D. Cal. 1998); *Bach v. Mason,* 190 F.R.D. 567, 571 & n.7 (D. Idaho 1999) (Garcia, J.). Here, all of the named defendants are similarly situated to the moving defendants with respect to plaintiff's failure to

state a claim.[3] Accordingly, dismissal as to all named defendants is appropriate at this time.

Finally, on February 20, 2004, defendants Peters and Crawford filed a motion to dismiss arguing that plaintiff's complaint should be dismissed as to them without prejudice for failure to complete service of process within 120 days of the filing of the complaint as required by Federal Rule of Civil Procedure 4(m). While those federal defendants noticed their motion for hearing, the court vacated that hearing with the indication that it would be re-set if necessary following the resolution of the instant motion. In light of the recommendation that the pending motion to dismiss be granted as to all defendants, it is not necessary to re-set the federal defendants' motion for hearing. Rather, it will be the recommendation of the court that the federal defendants' motion to dismiss be denied as moot.

CONCLUSION

Accordingly, IT IS HEREBY RECOMMENDED that:

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[3] Like defendants Martin and Penn Fishing, the complaint alleges that the other private defendants have infringed on plaintiff's copyright by selling products bearing the word "Kingmaster." While the complaint does not allege that federal defendants Mary Beth Peters, Register of Copyrights, and Clarence Crawford, Chief Administrative Officer for the United States Patent and Trademark Office have similarly sold infringing products, a liberal construction of the complaint suggests that plaintiff is alleging that the federal defendants are liable for allowing the private defendants to engage in the allegedly infringing conduct. Because plaintiff's claim against all of the defendants depends on plaintiff's asserted copyright interest in the word "Kingmaster," which the court has found to be invalid, the court also finds all of the named defendants to be similarly situated.

1. Defendants Martin and Penn Fishing's motion to dismiss for failure to state a claim be granted and this entire action be dismissed with prejudice[4] as to all named defendants; and

2. The federal defendants' motion to dismiss be denied as moot.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty (20) days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *See Martinez v. Ylst,* 951 F.2d 1153 (9th Cir. 1991).

DATED: August 6th, 2004.

/s/ Dale A. Drozd
DALE A. DROZD
UNITED STATES
MAGISTRATE JUDGE

[4] Given the nature of the deficiency, plaintiff cannot possibly cure the defects in his complaint. Granting leave to amend would be futile. *See Reddy v. Litton Indus., Inc.,* 912 F.2d 291, 296 (9th Cir. 1990); *Rutman Wine Co. v. E. & J. Gallo Winery,* 829 F.2d 729, 738 (9th Cir. 1987).

THE UNITED STATES CONSTITUTION

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare; and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section. 8.

Clause 8: To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

Article. III.

Section. 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2.

Clause I: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution,

the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

Note: Pertinent paragraphs are the only inclusions herein
From: http://www.house.gov/Constitution/Constitution.html

[Code of Federal Regulations]
[Title 37, Volume 1]
[Revised as of July 1, 2002]

[CITE: 37CFR202.1]

[Page 487]

TITLE 37 – PATENTS, TRADEMARKS, AND COPYRIGHTS CONGRESS

PART 202 – REGISTRATION OF CLAIMS TO COPYRIGHT – Table of Contents Sec. 202.1 Material not subject to copyright.

The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:

(a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents;

(b) Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing;

(c) Blank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like, which are designed for recording information and do not in themselves convey information;

(d) Works consisting entirely of information that is common property containing no original authorship, such as, for example: Standard calendars, height and weight

charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources.

(e) Typeface as typeface.

[24 FR 4956, June 18, 1959, as amended at 38 FR 3045, Feb. 1, 1973, 57 FR 6202, Feb. 21, 1992]

Copyright Law of the United States of America and Related Laws Contained in Title 17 of the *United States Code*

Chapter 1

Subject Matter and Scope of Copyright

§ 101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

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§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of

a machine or device. Works of authorship include the following categories:

(1) literary works;

Note: Pertinent paragraphs are the only inclusions herein (from http://www.copyright.gov/title17/92chap1.html)

CERTIFICATE OF COPYRIGHT REGISTRATION

FORM TX
UNITED STATES COPYRIGHT OFFICE

This certificate, issued under the seal of the Copyright Office in accordance with the provisions of section 410(a) of title 17, United States Code, attests that copyright registration has been made for the work identified below. The information in this certificate has been made a part of the Copyright Office records.

REGISTER OF COPYRIGHTS
United States of America

REGISTRATION NUMBER
TXu 160-239
TX TXU
EFFECTIVE DATE OF REGISTRATION
MAY 14 1984
Month Day Year

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

1 TITLE OF THIS WORK ▼

Kingmaster Rules

PREVIOUS OR ALTERNATIVE TITLES ▼

Six Player Chess and Checker Game Rules

PUBLICATION AS A CONTRIBUTION If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work ▼

n/a

If published in a periodical or serial give: Volume ▼ Number ▼ Issue Date ▼ On Pages ▼

n/a

2 a NAME OF AUTHOR ▼

Ronald Daniel Planesi

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼
Nov. 9, 1946

Was this contribution to the work a "work made for hire"?
☐ Yes
☒ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of ▶ U.S.A.
Domiciled in ▶ Sacramento, California

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☒ No
Pseudonymous? ☐ Yes ☒ No
If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of the material created by this author in which copyright is claimed. ▼

Full rules of play for 6-player chess and checker game called "Kingmaster"

NOTE
Under the law, the "author" of a "work made for hire" is generally the employer, not the employee (see instructions). For any part of this work that was "made for hire" check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part, and leave the space for dates of birth and death blank.

b NAME OF AUTHOR ▼

n/a

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☐ Yes
☐ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of ▶
Domiciled in ▶

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No
If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of the material created by this author in which copyright is claimed. ▼

c NAME OF AUTHOR ▼

n/a

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☐ Yes
☐ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of ▶
Domiciled in ▶

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No
If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of the material created by this author in which copyright is claimed. ▼

3 YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED This information must be given in all cases.
1984 ◀ Year

DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK
Complete this information ONLY if this work has been published.
Month ▶ Day ▶ Year ▶ ◀ Nation

4 COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2. ▼

Ronald Daniel Planesi
5930 Clover Manor Way
Sacramento, CA 95824

See instructions before completing this space.

TRANSFER If the claimant(s) named here in space 4 are different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright. ▼

DO NOT WRITE HERE OFFICE USE ONLY

APPLICATION RECEIVED
14 MAY 1984
ONE DEPOSIT RECEIVED
14 MAY 1984
TWO DEPOSITS RECEIVED
REMITTANCE NUMBER AND DATE
206571 MAY 14 84

App. 21